IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 174.

JAMES STILLMAN, APPELLANT,

vs.

C. B. COMBE, EXECUTOR et al.

and

RAFAELA M. de G. CAVAZOS AND CHILDREN,

APPELLEES.

BRIEF AND ARGUMENT OF J. D. CHILDS,

Of San Antonio, Texas, Counsel for Appellees.

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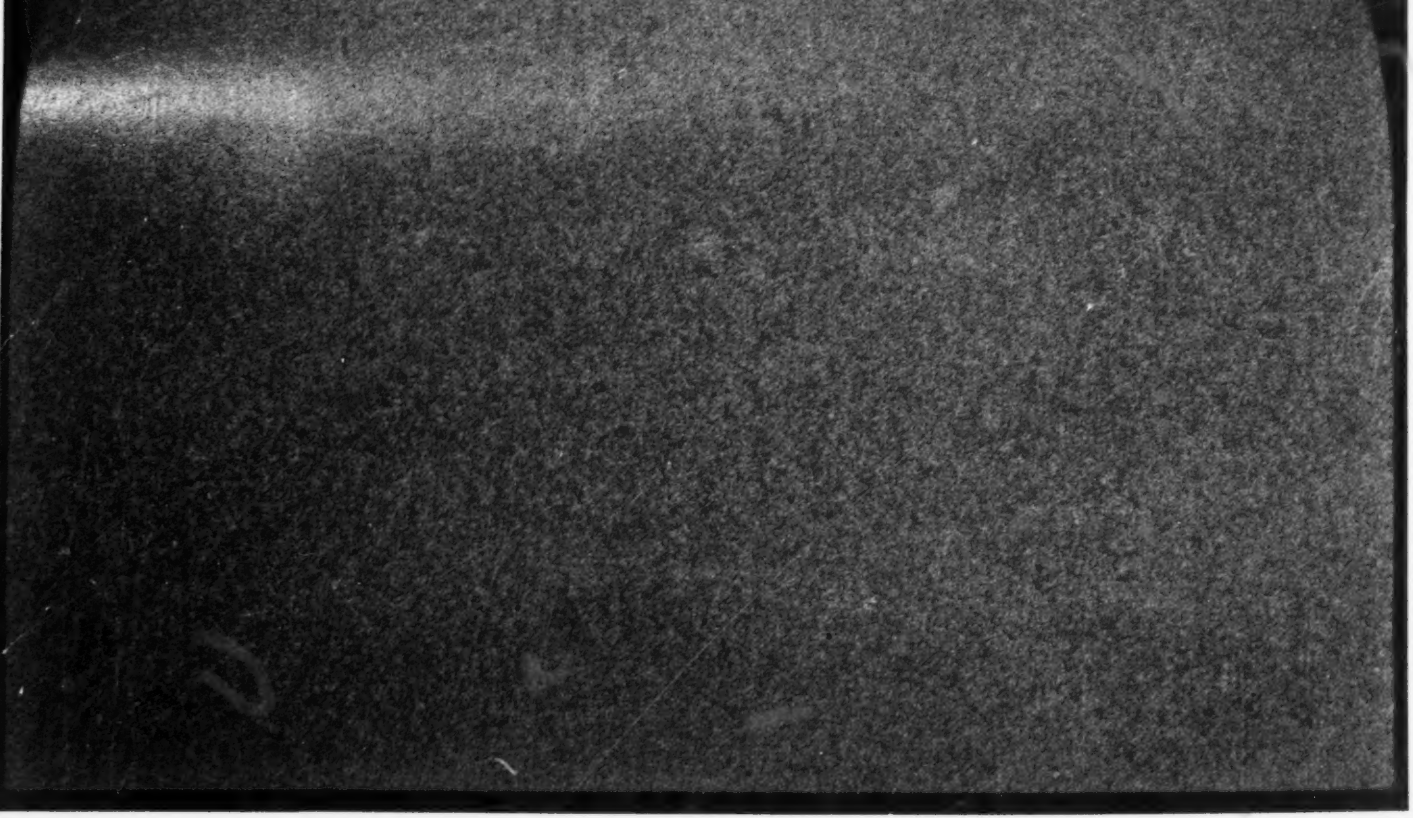

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Of San Antonio, Texas, Counsel for Appellees,

Mrs. Rafaela M. de G. Cavazos and Her Children: Rafaela G. M. Cavazos, Adela G. M. Cavazos, Josefina G. M. Cavazos, Julio G. M. Cavazos, Pedro G. M. Cavazos, and Jose G. M. Cavazos, who were Intervenors in the court below, having asserted interests therein independent of both plaintiffs and defendants and all other parties.

STATEMENT OF THE CASE BY COUNSEL FOR CAVAZOS Intervenors Below and Appellees Herein.

FIRST. This brief and argument is prepared without having seen any brief of appellant, therefore reference will be made only to the Assignments of Error, as made by appellant, Record p. 554 *et seq.*

The case has been fully stated by appellees Combe in their brief filed therein October 29th, 1904. This statement will be adopted with the further statement that the Cavazos, appellees, were permitted by the lower court to intervene, over the strenuous objections and resistance of Appellant, James Stillman and of Thomas Carson, both defendants, below, and upon final decree were awarded as heirs of Pedro G. Cavazos, deceased, one-third (1-3) of $44,110.02. (Rec. pp. 406 to 416, and Rec. pp. 567 to 570.)

And having this substantial interest in the judgment herein, they come now and present this as their separate brief and argument.

SECOND. The six Assignments of Error of appellant, being of similar nature and all based upon the contention that this suit is not ancillary to the Common Law Action No. 248, will be discussed together.

The reason and argument in said assignments of error are not tenable, because:—

1. James Stillman could not appear in Texas and use the machinery of the Texas court in said C. L. Action No. 248 for one purpose and before that purpose was consummated revoke and abjure its jurisdiction, when he was called upon to account in the same court for the proceeds of the money acquired by him under the orders and decrees of that court.

It is an elementary principle that a suitor cannot invoke the aid of any jurisdiction upon part of the merits of a cause, without yielding and submitting to it upon all questions therein involved unto its termination.

2. The agreement (Rec. pp. 26 to 30) was signed by James Stillman and Thomas Carson, July 13th, 1887. The judgment of the court which emanated from said agreement although not

appearing on the face of said decree was had July 14th, 1887 (Rec. p. 30) and it also appears that on July 15th, 1887, which was subsequent to the rendition of said judgment that all the parties to said agreement including Stillman and Carson voluntarily appeared before a notary public and acknowledged and reaffirmed said agreement. (Rec. p. 30).

This agreement and its ratification subsequent to the rendition of said judgment of July 14th, 1887, clearly expresses a trust in James Stillman and Thomas Carson.

It clearly shows that the judgment in question was a consent decree, and was not final, but only had for convenience in order that the said trustees might collect the $160,000.00 and pay it over to the arbitrators therein mentioned, and thus settle the controversy out of court. And as declared by the Circuit Court of Appeals of this circuit upon appeal of a former cause in which this same agreement was in issue, it "is to be commended rather than adversely criticised." Salinas vs. Stillman, 14 C. C. A., 54.

In this connection I cannot use stronger and more apt language than the same Circuit Court of Appeals of this circuit uses in speaking of this same agreement on a former appeal of this cause when it says: "To the eye of natural justice it would seem that if that court has not jurisdiction of the parties to the agreement that was in truth the basis of its judgment in Cause No. 248, with power to protect the beneficiaries in the trust clearly created by that Agreement, and which has so far borne fruit as to bring into the possession of the trustees the fund which was the material subject, not only of the Agreement, but of that litigation, its jurisdiction, proceeding, and processes have been successfully misused by the parties sought by this bill to be charged as trustees." Carson vs. Combe, 29 C. C. A., 669. I also desire to refer the court to this case as well as to the Salinas case *supra* for a brief but accurate statement of the facts which led to the said agreement and judgment.

3. It occurs to the writer that this suit is undoubtedly ancillary to C. L. Suit No. 248, and that the U. S. Circuit Court of the Southern District of Texas at Brownsville, Texas, which was formerly in the Western District of Texas, had jurisdiction over Stillman and Carson, under the principles laid down in the leading case of Carey vs. H. & T. C. Ry. Co., 161 U. S., 113, 40 L., 638. See also Krippendorf vs. Hyde, 110 U. S., 276, 28 L., 145. And many cases cited in Notes on U. S. Reports, Supplement by Thompson, Vol. 2, p. 605 (Ed. 1905), all recent Federal cases.

4. This ancillary suit having been brought by complainants against James Stillman and Thomas Carson individually and as administrator of the estate of Maria Josefa Cavazos (Rec. p. 2) could not have been brought and maintained as to Carson in said capacity in any other State than Texas, and had to be brought in the jurisdiction in which Cameron County, Texas, is situated, the said Carson having been appointed and qualified as such administrator C. T. A. in the county court of Cameron County, Texas, and this rule applies to Federal as well as State courts.

Johnson vs. Powers, 139 U. S., 156, 35 L. 112.

Kerr vs. Moon, 9 Wheat., 561, 6 L. 161.

Batts Revised Statutes of Texas, Art. 1194, Sec. 6.

5. Stillman and Carson being joint or co-trustees of the $160,000.00 fund, if Stillman was guilty of appropriating or converting said money it was a fraud against all of the claimants as well as said estate of Maria J. Cavazos, deceased. Carson as such administrator could not sue Stillman out of the courts of Texas.

Johnson vs. Powers, 139 U. S., 156, 35 L. 112.

Kerr vs. Moon, 9 Wheat, 561, 6 L. 161.

Then Stillman acting with a power of attorney from Carson, through his agent, John Garver (Rec. p. 35), was doubly a trustee with said Carson. Said Stillman was first made a co-trustee with Carson by the Agreement (Rec. p. 26), and was afterwards made the trustee of Carson in the fiduciary capacity of representative of said estate of Maria J. Cavazos, and incidentally created such by the county probate court of Cameron County, Texas, he was answerable in a two-fold capacity to the Texas courts.

The complainants could not sue Carson and Stillman in the same suit in any other State than Texas. Carson could not as administrator sue Stillman in any other State than Texas. The agreement above referred to was one transaction and indivisible, then what would be the reasoning in going to New York to sue Stillman for the joint wrong of Stillman and Carson, which said wrong was so connected as to be one and the same transaction?

Why should Stillman not come to Texas as well as Carson attempt to sue in New York?

Carson could not sue in New York, then there was but one forum where the suit could properly be brought and that one was the Western, now the Southern, District of Texas.

Besides this suit is ancillary, and the court has possession of and gave the orders which secured the *res*, this, therefore, draws to the lower court all controversies concerning the *res*.

Byers vs. McAuley, 149 U. S., 614.

Hayes vs. Pratt, 147 U. S., 570.

Green vs. Creighton, 23 How., 90.

Chambers vs. Cannon, 62 Texas, 293.

Eckford vs. Knox, 67 Texas, 205.

Patton vs. Gregory, 21 Texas, 513.

I believe this case should not be disturbed on account of want of jurisdiction of the lower court. While I do not concur in the

large amount awarded to Stillman, yet I submit that the only question now before the court is one purely of jurisdiction and that the appeal should either be dismissed because of a defective certificate from the lower court or because the question of jurisdiction has already been determined by our Circuit Court of Appeals.

Otherwise the case should be affirmed with costs and 10 per cent damages for delay.

Counsel for Rafaela M. de G. Cavazos and Children, Appellees.